Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2688

Appeal PA07-118

Ministry of Training, Colleges & Universities

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NATURE OF THE APPEAL:

The Ministry of Training, Colleges & Universities (the Ministry) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the same requester. The first request sought access to:

> …any all documentation related to contracts or service agreements between the Ministry of Education and [named company] (including, but not limited to specific reports or financial analysis related to contracts or service performance, invoice information, contracts, service agreements, audits, e-mail, phone message, internal staff reports etc…).
>
> We are requesting the above for any services the company provides or provided from December 2006 back to December 2004. Services [named company] provides includes (but is not limited to) uniform supply, mat rental and shredding/document storage services.

The Ministry assigned request number EDU-070003 to the first request.

The second request sought access to:

> …any all documentation related to contracts or service agreements between the Ministry of Training, Colleges & Universities and [same named company] (including, but not limited to specific reports or financial analysis related to contracts or service performance, invoice information, contracts, service agreements, audits, e-mail, phone message, internal staff reports etc…).
>
> We are requesting the above for any services the company provides or provided from December 2006 back to December 2004. Services [named company] provides includes (but is not limited to) uniform supply, mat rental and shredding/document storage services.

The Ministry assigned request number MTCU-060064 to the second request.

The Ministry located a total of 43 documents, consisting of 23 invoices relating to the first request and 18 invoices and 2 documents relating to the second request. The Ministry notified the company named in the requests under section 28 of the *Act* thus raising the possible application of the third party information exemption at section 17(1). During the inquiry process, the Ministry advised this office that it did not notify the other company named in the records as it had been purchased by the named company. The named company set out its position objecting to disclosure in a letter to the Ministry. The Ministry considered the named company's position and decided to disclose the responsive records, but withheld the Ministry's credit card number found on the invoices. The Ministry withheld the credit card information pursuant to section 18(1) (economic and other interests) of the *Act*. The requester did not appeal the application of section 18(1) of the *Act* to the responsive records.

The named company (the appellant), however, appealed the Ministry's decision to disclose the remaining information to the requester to this office. As a result, the responsive records were not provided to the requester. The appeal form submitted by the appellant indicates that it takes the position that the request is frivolous, vexatious and made in bad faith and that the records are exempt under section 17(1) (third party information) of the *Act*. In support of its position, the appellant attached a copy of its letter to the Ministry, along with printed information from public websites.

During mediation, the requester narrowed the scope of its request to the total amount charged in each invoice. Accordingly, the remaining information contained on the invoices is not at issue in this appeal. The requester also advised the mediator that it continued to seek access to the two documents, in their entirety.

The appellant did not respond to communication attempts by the mediator and as a result, no further mediation was possible and this appeal was transferred to adjudication.

The Adjudicator initially assigned to this appeal decided to commence an inquiry by sending a Notice of Inquiry to the appellant setting out the facts and issues. The appellant was asked to review the issues set out in the Notice of Inquiry and to provide written representations in support of its position. The Notice of Inquiry advised the appellant that where an institution seeks to disclose a record or part of a record to which section 17(1) may apply, the burden of proof that the record or part of the record falls within that mandatory exemption lies upon the party resisting that disclosure. The appellant was also asked to provide representations in support of its position that it is entitled to raise and rely on the frivolous and vexatious provisions of the *Act*. The appellant did not submit representations. This office subsequently contacted the appellant, who requested another copy of the Notice of Inquiry. Another copy of the Notice of Inquiry was sent and the appellant was provided with additional time to submit representations. Again the appellant did not submit representations.

As a result, the only evidence before me is the appellant's appeal form and attachments, including its letter to the Ministry and the records. The Ministry and requester were not provided with copies of the materials filed by the appellant as it objected to their release.

This appeal was subsequently transferred to me in order to complete the inquiry.

RECORDS:

There are three types of records at issue:

Invoices	41 pages	The requester is only seeking the "total amount" reported on each invoice
Completed work order form	1 page	The requester seeks access to the entire record
Partially completed work order form	1 page	The requester seeks access to the entire record

DISCUSSION:

PRELIMINARY ISSUE

The appellant's response to the section 28 notification from the Ministry submits that the request is frivolous, vexatious and made in bad faith. The appellant submits that the request is intended to accomplish an objective other than to gain access to the responsive record. In particular, the appellant submits that the request seeks to obtain information which, if released, would harm its commercial and business interests. In support of its position, the appellant makes references to sections 24(1.1), 27.1(1)(a) and (b) of the *Act*. These sections provide that if the institution is of the opinion that the request is frivolous and vexatious it is not necessary for the institution to follow certain procedures required under the *Act*. These procedures are not relevant in the circumstances of this appeal as the Ministry did not raise the frivolous and vexatious provisions of the *Act*. Instead, the Ministry decided to process the request and issued a decision to the requester granting partial access to the responsive records. As a result, the issue in this appeal is whether a party, who is not an institution, can raise the frivolous and vexatious provisions of the *Act*. The frivolous and vexatious provisions are set out in section 10(1)(b) of the *Act* and section 5(1) of Regulation 460.

Section 10(1)(b) reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 460 reads:

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
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> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

Section 10(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly

[Order M-850]. An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious [Order M-850].

The issue of whether a party should be permitted to raise the frivolous and vexatious provisions not raised by the institution has been previously considered by this office. The Notice of Inquiry sent to the appellant reproduced portions of Orders PO-2050 and PO-2490 and asked the appellant to explain why the frivolous and vexatious provisions of the *Act* should apply in the circumstances of this appeal. As previously noted, the appellant did not provide representations in response to the Notice of Inquiry.

The issue before Adjudicator Cropley in Order PO-2050 was whether an affected person could rely on the application of the frivolous or vexatious provisions to claim that access to a record should be denied where the institution had not made this claim. In that appeal, the affected person appealed the institution's decision to grant the requester partial access to the information at issue. The affected person provided representations in support of his position that the personal privacy provisions of the *Act* applied to the information at issue. The affected person, however, also raised concerns about the requester's intended use of the information and asked this office to determine whether the request itself was vexatious. In Order PO-2050, Adjudicator Cropley reviewed previous decisions from this office and adopted the reasoning in Order P-257 that finds that, but for the exemptions at sections 17(1) (third party information) and 21(1) (personal privacy), it is up to the institution to determine which exemptions, if any, should apply to any requested record.

In Order PO-2050, Adjudicator Cropley states:

> In my view, the rationale for not permitting an affected person to raise a discretionary exemption (in most cases) is similarly applicable to a claim by the affected person that the request is vexatious. This is not to say that an affected party may never raise an issue of "harm" in the particular circumstances relating to a request. In previous orders of this office, adjudicators have considered the discretionary exemptions in sections 14(1)(e) (danger to life or safety) (Order PO-1787) and 20 (danger to safety or health) (Reconsideration Order R-980015) in circumstances where the affected person raised their application. However, these remain the very rare case.
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> …
>
> In the circumstances of the current appeal, the concerns raised by the affected person pertain to the harm to personal privacy, which he believes he and his family will suffer as a result of disclosure. In part, these concerns are connected to the identity of the requester. In my view, the various provisions under sections 21(2) and (3) are specifically intended to address concerns of this nature.
> …
>
> Even if the provisions of the *Act* are not available to prevent disclosure of the information in the records, I am not persuaded that the affected person should be

permitted to raise the frivolous or vexatious provisions of the *Act*. In Order M-850, Assistant Commissioner Tom Mitchinson commented on the implications of a finding that a request is frivolous or vexatious:

> In January 1996, the Legislature amended section 4 of the *Act*, thereby providing institutions with a summary mechanism to deal with requests which the institution views as frivolous or vexatious. These legislative provisions confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act*. In my view, this power should not be exercised lightly.
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> …
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> Section 42 of the *Act* places a burden on institutions to demonstrate the application of exemptions. It does not offer specific guidance on the burden of proof regarding decisions that a request is frivolous or vexatious. However, the general law is that the burden of proving an assertion falls on the party making the assertion. On this basis, I find that an institution invoking section 4(1)(b) of the *Act* has the burden of proof.

In considering the manner in which this provision should be interpreted, previous orders of this office have consistently held that the application of the frivolous and vexatious provisions is only relevant to the use of the "processes" of the *Act* (see, for example: Order MO-1488). Essentially, once it is determined that a request has been made for the purpose of obtaining access (or for legitimate reasons), this purpose is not contradicted by the possibility that the requester may also intend to use the documents against the institution (or any other party) (see: Orders MO-1269, P-1534 and MO-1488, for example). In my view, the frivolous and vexatious provisions of the *Act* were enacted to provide institutions with a tool to enable them to address abuses of the processes of the *Act*. I cannot see how such abuses would impact on affected persons in a way that would trigger the application of this provision.

…

Moreover, the frivolous and vexatious provisions were not intended to be used by institutions or individuals to prevent disclosure of records that would otherwise be available under the *Act* because these parties do not like the nature of the request or the person requesting the information. As I noted above, the focus of the affected person's concerns is the use to which the requester may put the records if they are disclosed. In my view, this concern is more appropriately dealt with under the "harms" provisions of various exemptions set out in the *Act*.

In Order PO-2490, Senior Adjudicator John Higgins reviewed the language in sections 5.1(a) and (b) of Regulation 460, reproduced above, and found that the requirement that the head of the institution must form an opinion that the request is frivolous or vexatious make it even more difficult for an affected party to rely on those provisions than to rely on a discretionary exemption.

Like the appellant in Order PO-2050, the appellant in this appeal raises concerns about what it believes the requester will do with the information at issue, if disclosed. In this regard, the appellant submits that disclosure of the information at issue would damage its financial and commercial interests. These are the very same arguments the appellant makes in support of its position that the information at issue is exempt under the third party information exemption at section 17(1) of the *Act*.

In my view, the circumstances of this appeal do not give rise to one of those rare occasions when this office considers the application of a section of the *Act*, not raised by the institution which is not one of the mandatory exemptions. In making my decision, I adopt and agree with the reasoning of Senior Adjudicator Higgins and Adjudicator Cropley. In particular, I share their view that the frivolous and vexatious provisions of the *Act* are not intended to be used by parties resisting disclosure of records that would be otherwise subject to the *Act* because these parties do not like the nature of the request or are suspicious of the requester. Accordingly, I confirm that this office's duty to consider the application of the frivolous and vexatious provisions of the *Act*, when raised by an affected party, will arise in very limited circumstances.

The representations of the appellant do not support a finding that it is necessary to consider the frivolous and vexatious provisions of the *Act* in the circumstances of this appeal. In particular, the representations of the appellant, including the printed information attached to the appeal form, fail to demonstrate that the Ministry's decision to process the request is clearly inconsistent with the *Act* or that the request was made for illegitimate reasons. In any event, the alleged harms raised by the appellant have already been addressed by the possible application of the mandatory third party information exemption in section 17(1) of the *Act*. In my view, the third party information exemption, not the frivolous and vexatious provisions, is specifically intended to address concerns relating to alleged harms arising from the disclosure of business information.

Having regard to the above, I find that the appellant, in the circumstances of this appeal, is not able to raise the frivolous or vexatious provision of the *Act* and this office has no obligation to consider it.

THIRD PARTY INFORMATION

As noted above, the Ministry raised the possible application of the mandatory third party information exemption at section 17(1) and notified the appellant under section 28 of the *Act*. After considering the appellant's response to the section 28 notification, the Ministry decided that the responsive records were not exempt under section 17(1) and advised the appellant it was prepared to release the records to the appellant. The appellant appealed the Ministry's decision to this office and takes the position that the information at issue qualifies for exemption under sections 17(1)(a), (b) and (c) of the *Act*. These sections read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The appellant submits that the information at issue constitutes commercial and financial information. Commercial and financial information have been defined in prior orders, as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large

> and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

As a result of the requester narrowing the scope of the request, the only information at issue is the total amount reported on 41 invoices and the information contained on the two work order forms. As the total amount reported on the invoices relates to the amount the Ministry paid the appellant for its services, I am satisfied that this information constitutes financial information.

The two work order forms appear to have been created by the company purchased by the appellant. The forms are to be filled out initially by the Ministry and then completed by the appellant's employee. The top of the forms contain the defunct company's letter head. The forms are blank and allow for completion of the following information: client address, ticket number, routine instructions, room, description, container, service item, quantity, time in/out, driver, service/comments and signatures from the service provider and the client. As the forms relate to the services the appellant provides to the Ministry, I am satisfied that the forms contain commercial information that relates to the buying, selling or exchange of services.

In summary, I find that the information contained in the invoices and work order forms qualify as "financial" or "commercial" information and thus meets the requirements of part 1 of the test. I will now assess whether the Ministry has satisfied part 2 of the test with respect to the remaining information at issue.

Part 2: supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The appellant's representations submit that the information contained in the invoices and work order forms were supplied in confidence to the Ministry. The appellant also submits that it had a reasonable expectation of confidentiality, implicit or explicit, at the time it provided the information to the Ministry. The appellant explained that its employees are bound by a confidentiality provision set out in their contracts of employment. The appellant submits that the confidentiality provision prohibits disclosure of the information at issue to outside parties. However, the appellant did not provide any documentation, such as a copy of the contract, in support of its position.

On its face, some of the information contained on the records does not appear to have been directly supplied by the appellant to the Ministry. This includes information the Ministry itself completed on the work order forms such as the date, instructions, address, telephone number, and the Ministry's contact person's name and signature. Clearly this information does not meet the "supplied" component of part 2 of the test as the information was not directly supplied to the Ministry by the appellant. Rather, it is the other way around.

Though an argument can be made that the remaining information was supplied to the Ministry by the appellant, it is not necessary that I discuss the "supplied" component of the test any further as the records themselves do not support a finding that the information was supplied "in confidence".

As stated above, in order to satisfy the "in confidence" component of part two, the appellant must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

In my view, the appellant has not provided convincing evidence supporting its position that when it provided the information to the Ministry, it did so on the basis that it was confidential and that it was to be kept confidential. In making my decision, I note that there is no evidence supporting a finding that the appellant's expectation of confidentiality was explicit as the invoices and work order forms are not marked "confidential". Further, I find that the appellant's position that the information at issue was provided to the Ministry with an expectation of confidentiality is not reasonable considering the fact that the information was provided in response to a pick up arranged by the Ministry and the dollar amounts reported on the invoices represents monies the Ministry paid to it.

Having regard to the above, I find that this part of the three-part test under section 17(1) has not been satisfied. However, for the sake of completeness, I will also consider the "harms" component of the three-part test under section 17(1) of the *Act*.

Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The appellant submits that disclosure of the information contained in the records would reveal detailed pricing estimates, price lists and invoices which if disclosed could reasonably be expected to significantly prejudice its competitive position, interfere with its contractual or other negotiations with the Ministry and result in an undue loss or gain (sections 17(1)(a) and (c)). The appellant also takes the position that disclosure of detailed pricing estimates and price lists would enable competitors to undercut its prices and could reasonably result in it no longer supplying similar information to the Ministry (section 17(1)(b)).

The information at issue, however, does not contain detailed pricing estimates, price lists or itemized invoices. Rather the information remaining at issue following the narrowing of the scope of the request by the requester is the total amount the appellant charged the Ministry on each of the 41 invoices and information contained on the work order forms. In my view, disclosure of this information could not reasonably be expected to prejudice significantly the appellant's competitive position or result in an undue loss or gain (sections 17(1)(a) and (c)) as the information is not itemized and does not reveal information as to how the appellant prices its individual services. Further, the appellant did not provide detailed and convincing evidence in support of its position. In my view, the evidence provided by the appellant amounts to speculation fuelled by its belief that the requester seeks access to the information at issue for illegitimate reasons.

I am also not persuaded that disclosure of the information at issue could reasonably be expected to result in similar information no longer being supplied to the Ministry in the future, as contemplated in section 17(1)(b) of the *Act*. The appellant's evidence that it would refrain from providing the Ministry with detailed invoices while still expecting to receive payment from the Ministry is not convincing. In any event, the requester is not seeking access to itemized invoice information.

Having regard to the above, even if I was persuaded that the information at issue met the "supplied in confidence" test in part two of the three-part test, I find that, disclosure of the information at issue could not reasonably be expected to result in the harms contemplated in sections 17(1)(a), (b) or (c) of the *Act*.

As I have found that the appellant has failed to satisfy parts 2 and 3 of the three-part test, the commercial and financial information at issue does not qualify for exemption under section 17(1) and should be disclosed to the requester.

ORDER:

1. I uphold the Ministry's decision and order the Ministry to disclose the information at issue to the requester by **August 5, 2008** but not before **July 29, 2008**.

2. In order to verify compliance with this Order, I reserve the right to require the Ministry to provide me with a copy of the records it disclosed to the requester.

Original signed by: June 30, 2008
Jennifer James
Adjudicator